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Mohd Ridzwan bin Mohd Sidek & Anor v Hong Leong Bank Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–306 OF 2010
LIM CHONG FONG JC
29 MAY 2014

Land Law — Charge — Forgery — Property co-owner's signature on charge document forged — Whether charge rendered void although other co-owner voluntarily signed document — National Land Code s 340 — Whether estoppel could preclude land owners from raising issue of forgery to avoid liability under the charge — Whether 'innocent' co-chargor's constructive knowledge of redemption of earlier charge on property could amount to acquiescence to creation of new charge — Whether estoppel could be used to overcome challenge, and subsequent finding by court, that charge was statutorily void for forgery

The plaintiffs herein sought to have the High Court declare as invalid a charge that had been created in the defendant's favour on a residential property the plaintiffs co-owned. They also sought to set aside an order for sale that had been made in respect of the property based upon default under the charge. The property was previously charged by the plaintiffs to another bank ('Wah Tat Bank') for an overdraft facility but that charge was redeemed from a refinancing loan granted by the defendant. The plaintiffs' and the defendant's versions of the facts as presented to the court were substantially at variance. The second plaintiff, PW2, who was the elder sister of the first plaintiff, PW1, testified that she charged the property to the defendant to use the loan obtained to help her friend, PW3, settle her debts to loan sharks; that PW2 and PW3 collaborated with two others, Allan and Chin, to use fabricated Inland Revenue Department Notices of Assessment of business income of PW2 and a forged identity card of PW1 to obtain the loan and complete the execution of the charge document. The plaintiffs said that none of the material documents in the case were ever signed in the presence of the defendant's officers or before its lawyers and that all relevant documents were signed at Allan's office. At the trial, Allan, Chin and the person who forged PW1's signature, were never called to testify. Essentially, the plaintiffs' case was that the defendant had conspired with its solicitors and loan sharks to defraud them of their property. On the other hand, the defendant's witnesses testified that all procedures for the processing of the plaintiffs' application to refinance the property, the execution of the loan documentation and charge and the disbursement of the loan were properly followed and there was no fraud or negligence on the defendant's part as was alleged by the plaintiffs. Inter alia, the defendant argued that issue estoppel should apply to preclude the plaintiffs from raising the issue of forgery

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of PW1's signature in the instant proceedings because (i) PW1 was, or ought to have been, aware of the redemption of the Wah Tat Bank charge and therefore had acquiesced to the creation of the charge in the defendant's favour and (ii) the plaintiffs ought to have, but did not, raise the defence of forgery during the proceedings when the order for sale of the property was made.

Held, declaring the charge to be null and void and setting aside the order for sale of the property:

(1) On balance of probabilities, the court found that PW1's signature on the charge instrument had been forged. As he was the co-owner/co-chargor of the property and the charge was obtained through the forgery of his signature, the charge instrument was void and of no effect. This was so in a jointly created instrument where a party did not truly sign on the instrument notwithstanding that the other parties had signed (see paras 59 & 67–69).

(2) The defendant could not rely upon estoppel to preclude the plaintiffs from raising the issue of forgery. There was no cogent evidence that PW1 had actual knowledge of the redemption of the Wah Tat Bank charge. Constructive knowledge about that fact was insufficient to justify an estoppel against PW1 on the basis alleged by the defendant. Issue estoppel also could not be raised to overcome a challenge that the charge instrument was void as declared by statute, particularly as it was so found by the court. It was unjust to PW1 if the order for sale of the property was maintained (see paras 70–72).

(3) The court found PW2 voluntarily applied for the loan from the defendant and that she had signed the charge instrument before the defendant's solicitor, DW4, and that the loan was used to redeem the loan from Wah Tat Bank and to pay off the third parties from whom PW2 and PW3 had borrowed monies (see paras 50 & 52).

(4) No fraud or negligence was committed by the defendant whether through its employee, DW3, or its agents. The plaintiffs not only failed to plead conspiracy to defraud sufficiently but also failed to adduce cogent evidence that met the required high burden of proof to justify the plea of fraud. They also failed to prove the defendant had been careless in failing to act in accordance with standard banking practices in approving the loan (see paras 60–62).

(5) The court found the defendant's witnesses were truthful from their demeanour and satisfactory explanations vis-a-vis the documentary evidence adduced at the trial. They did not falter under rigorous cross-examination. Except for PW1, whom the court found to be truthful, both PW2 and PW3 were not entirely truthful. Parts of their testimony defied common sense while other parts did not wholly fit

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much of the contemporary documentary evidence. The story as told by both of them was to an extent incredulous (see paras 40–41 & 53).

[Bahasa Malaysia summary

Plaintif-plaintif memohon kepada Mahkamah Tinggi untuk mengisytiharkan pajakan yang dibuat bagi defendan ke atas hartanah kediaman yang dimiliki bersama oleh plaintif-plaintif. Mereka juga memohon untuk mengetepikan satu perintah jualan yang telah dibuat ke atas hartanah tersebut berdasarkan keingkaran di bawah pajakan tersebut. Hartanah tersebut telah dipajak oleh plaintif kepada satu lagi bank ('Wah Tat Bank') bagi kemudahan overdraf tetapi pajakan tersebut telah ditebus daripada pinjaman pembiayaan semula yang diberikan oleh defendan. Versi plaintif-plaintif dan defendan berkenaan fakta yang dikemukakan di mahkamah adalah berbeza. Plaintif kedua, PW2 yang merupakan kakak plaintif pertama, PW1, memberi keterangan bahawa dia memajakkan hartanah tersebut kepada defendan untuk menggunakan pinjaman yang diperolehi untuk membantu rakannya, PW3, menyelesaikan kesemua hutangnya kepada along; bahawa PW2 dan PW3 bersubahat dengan dua yang lain, Allan dan Chin, untuk menggunakan notis-notis taksiran pendapatan perniagaan PW2 Jabatan Hasil Dalam Negeri yang telah dipalsukan dan kad pengenalan PW1 yang telah dipalsukan untuk mendapatkan pinjaman dan memenuhi pelaksanaan dokumen pajakan. Plaintif-plaintif menyatakan bahawa tiada dokumen material dalam kes tersebut yang ditandatangani dengan kehadiran pegawai-pegawai defendan atau di hadapan peguamnya dan bahawa dokumen-dokumen relevan ditandatangani di pejabat Allan. Semasa perbicaraan, Allan, Chin dan individu yang memalsukan tandatangan PW1, tidak dipanggil untuk memberi keterangan. Pada asalnya, kes plaintif adalah bahawa defendan telah bersubahat dengan peguamcara-peguamcaranya dan along-along untuk menipu hartanah mereka. Sebaliknya, saksi-saksi defendan memberi keterangan bahawa kesemua prosedur bagi pemprosesan permohonan plaintif-plaintif untuk membiayai hartanah tersebut, pelaksanaan dokumentasi pinjaman dan pajakan dan pembayaran pinjaman telah dipatuhi dengan betul dan tiada penipuan atau kecuaian di pihak defendan seperti yang didakwa oleh plaintif-plaintif. Antara lain, defendan menghujahkan bahawa isu estopel seharusnya terpakai untuk mengecualikan plaintif-plaintif daripada membangkitkan isu pemalsuan tandatangan oleh PW1 dalam prosiding ini kerana PW1 telah, atau sepatutnya sedar mengenai tebusan pajakan Wah Tat Bank dan oleh itu, telah dilepaskan kepada pembentukan pajakan bagi defendan; dan plaintif-plaintif sepatutnya, tetapi tidak, membangkitkan pembelaan penipuan ketika prosiding apabila perintah jualan dibuat.

Diputuskan, mengisytiharkan pajakan sebagai batal dan tidak sah dan mengenepikan perintah jualan hartanah:

(1) Atas imbangan kebarangkalian, mahkamah mendapati bahawa

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tandatangan PW1 dalam instrumen pajakan telah dipalsukan. Oleh kerana dia merupakan pemilik bersama/pemajak bersama hartanah dan pajakan diperolehi melalui penipuan tandatangannya, instrumen pajakan adalah batal dan tidak mempunyai kesan. Ini adalah yang sebegitu dalam instrumen yang dibentuk bersama di mana satu pihak tidak benar-benar menandatangani instrumen tanpa mengira bahawa pihak-pihak lain telah menandatangan (lihat perenggan 59 & 67–69).

(2) Defendan tidak boleh bergantung kepada estopel untuk mengecualikan plaintif-plaintif daripada membangkitkan isu penipuan. Tiada keterangan yang jelas bahawa PW1 mempunyai pengetahuan sebenar mengenai tebusan pajakan Wah Tat Bank. Pengetahuan konstruktif mengenai fakta adalah tidak mencukupi untuk memberi justifikasi terhadap PW1 atas asas yang didakwa oleh defendan. Isu estopel juga tidak boleh dibangkitkan untuk mengatasi cabaran bahawa instrumen pajakan adalah batal seperti yang diisytiharkan oleh statut, khasnya kerana telah diputuskan sedemikian oleh mahkamah. Adalah tidak adil kepada PW1 sekiranya perintah jualan hartanah tersebut dikekalkan (lihat perenggan 70–72).

(3) Mahkamah mendapati bahawa PW1 secara suka rela memohon pinjaman tersebut daripada defendan dan bahawa dia telah menandatangani instrumen pajakan di hadapan peguamcara defendan, PW4 dan bahawa pinjaman tersebut digunakan untuk menebus pinjaman daripada Wah Tat Bank dan membayar pihak ketiga daripada mana PW2 dan PW3 telah meminjam wang (lihat perenggan 50 & 52).

(4) Tiada penipuan atau kecuaian yang dilakukan oleh defendan sama ada melalui majikannya, DW3 atau ejen-ejennya. Plaintif-plaintif bukan sahaja gagal untuk memplidkan konspirasi untuk menipu secukupnya tetapi juga gagal untuk mengemukakan bukti kukuh yang memenuhi beban pembuktian yang berat untuk menjustifikasikan pli penipuan. Mereka juga gagal membuktikan bahawa defendan cuai dalam bertindak selaras dengan amalan standard perbankan dalam meluluskan pinjaman (lihat perenggan 60–62).

(5) Mahkamah mendapati bahawa saksi-saksi defendan adalah jujur berdasarkan tingkah laku dan penjelasan mereka yang memuaskan berkenaan keterangan dokumentari yang dikemukakan semasa perbicaraan. Mereka tidak teragak-agak di bawah pemeriksaan semula yang ketat. Kecuali PW1, yang mahkamah anggap jujur, kedua-dua PW2 dan PW3 tidak jujur sepenuhnya. Sebahagian daripada keterangan mereka mencabar akal manakala bahagian-bahagian lain tidak memenuhi keterangan dokumentari semasa, sepenuhnya. Kisah yang diperihalkan oleh kedua-dua mereka, di suatu peringkat, tidak boleh dipercayai (lihat perenggan 40–41 & 53).]

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Notes

For cases on forgery, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2648–2651.

Cases referred to

AGS Harta Sdn Bhd v Liew Yok Yin [2010] 1 MLJ 309; [2010] 7 CLJ 142, CA (refd)

Arnold v National Westminster Bank plc [1991] 2 AC 93, HL (refd)

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301, FC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Australian Guarantee Corpn Ltd v De Jager [1984] VR 483, SC (refd)

Chiew Lip Seng v Perwira Habib Bank (M) Bhd [1999] 1 MLJ 310; [1999] 5 CLJ 112, HC (refd)

Chong Su Kong & Others v Sia Hiong Yee & Others [2010] MLJU 957; [2011] 2 CLJ 801, HC (refd)

Edler v Auerbach [1949] 2 All ER 692, KBD (refd)

Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 4 MLJ 651, CA (refd)

Fung Kai Sun v Chan Fui Hing [1951] AC 489, PC (refd)

Gibbs v Messer and others [1891] AC 248, PC (refd)

Greenwood v Martin's Bank, Ltd [1933] AC 51, HL (refd)

Johara Bi Binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139, FC (refd)

Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768; [2014] 1 CLJ 987, FC (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457, PC (refd)

Kodrat Suradji v Banque Nationale de Paris [1992] 2 SLR 676, HC (distd)

Liew Yok Yin v AGS Harta Sdn Bhd [2006] 7 MLJ 49; [2006] 3 CLJ 787, HC (refd)

McLaren Saksama (M) Sdn Bhd v Hong Leong Bank Bhd [2014] 7 MLJ 104, HC (refd)

Mohd Nasir bin Moidu v Lee Swee Kim [2011] 7 MLJ 606, HC (refd)

Ng Yee Fong & Anor v EW Talalla [1986] 1 MLJ 25, SC (refd)

Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd [1980] 2 MLJ 83, FC (refd)

Siaw Kim Seong v Siew Swee Yin (f) & Anor [2009] 1 MLJ 349; [2008] 5 CLJ 441, CA (refd)

Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673, HC (refd)

Thien Kon Thai, Re [2008] 6 MLJ 278, CA (refd)

Tiagaraja a/l Palaniandy (as the administrator for the estate of Palaniandy a/l Pichay Karan, deceased) v Moganadas a/l Maniam (as the personal

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representative of Maniam a/l Kathan, deceased) & Anor [2011] 7 MLJ 326; [2011] 4 CLJ 215, HC (refd)
Yong Tim v Hoo Kok Chong [2005] 3 CLJ 229, FC (refd)

Legislation referred to

Evidence Act 1950 ss 73, 101, 101(2), 102, 103
National Land Code s 340, 340(2)(a), (b)

Joseph Iruthayam (Joseph Iruthayam & Co) for the plaintiffs.
Sathaya Kumardas (Izahairani Izani with her) (Shearn Delamore & Co) for the defendant.

Lim Chong Fong JC:

INTRODUCTION

[1] This is a suit for annulment of a charge instrument created pursuant to a bank loan facility.

[2] The plaintiffs are siblings. The first plaintiff is the younger brother of the second plaintiff. They are the co-registered proprietors of equal undivided shares in a property held under Title No 38521 Lot No 17106, Mukim Damansara, District of Petaling, Selangor ('the property'). The postal address of the property is 12, Jalan SS 1/19, Kampung Tunku, Sg Way 47300, Petaling Jaya, Selangor. The property was transferred to the plaintiffs by their father for love and affection.

[3] The defendant at the commencement of the suit was originally EON Bank Bhd ('EON Bank'). By a vesting order dated 17 June 2011 entered in the Kuala Lumpur High Court Originating Summons No 24 NCC-175 of 2011, all the assets, rights and liabilities of EON Bank Bhd were vested upon the defendant.

THE TRIAL PROCESS

[4] The trial of this suit consumed three days from 12–14 February 2014. The trial documents were marked as bundles A to E which included the documentary evidence relied by the parties. The documentary evidence adduced were bundles B1, B2, B3, F (pp 5–10 only) and exhs P1–P6 and D7 to D13. The following witnesses gave sworn testimony for the respective parties:

(a) Ridzwan bin Mohd Sidek ('PW1'), the first plaintiff;

(b) Junaidah bt Mohd Sidek ('PW2'), the second plaintiff;

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(c) Chong Yoke Cheng ('PW3'), a friend of PW2;

(d) Sunny Lim ('DW1'), manager of the defendant bank;

(e) Woon Guek Phong ('DW2'), credit administration manager of the defendant bank;

(f) Hoo Geok Ho ('DW3'), formerly assistant manager (credit) of the defendant bank;

(g) Suhaili bin Mohd Yusoff ('DW4'), formerly partner of Messrs Suhaili & Song, Advocates & Solicitors ('Suhaili & Song'); and

(h) Chitra Veerasinghe a/p NP Weerasingham ('DW5'), formerly conveyancing clerk at Suhaili & Song.

[5] After trial, the parties submitted concurrent written closing submissions-in-chief and written closing submissions in reply.

COMMON INDISPUTABLE FACTS

[6] The facts in this suit were heavily contested in most aspects.

[7] Nevertheless it is common ground that PW2 in 2003 obtained a bank loan from EON Bank. The security for the loan is a charge on the property ('the charge'). The loan documentation was carried out by Suhaili & Song, a firm of advocates and solicitors. After having drawn down on the loan, PW2 defaulted in repaying the loan. EON Bank commenced legal action against PW2 and judgment was obtained against her on 24 December 2004.

[8] As the result of PW2's failure to pay as ordered in the judgment, PW2 was thereafter adjudicated a bankrupt on 13 August 2008. Furthermore the defendant commenced foreclosure proceedings against the plaintiffs vide Shah Alam High Court Suit No 24–929 of 2007 and obtained an order for sale of the property on 3 October 2007.

THE PLAINTIFFS' VERSION OF THE FACTS AND CONSEQUENCES

[9] According to PW2's testimony, she was a former clerk at the management and manpower planning unit of the Prime Minister's Department. After resigning from government service, she was in 1997 employed by Lim Kok Wing University as a student affairs manager with a disposable salary of about RM2,600 monthly.

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Loan procurement

[10] Since March 2000, PW2 had obtained a bank loan facility of RM100,000 from Wah Tat Bank Bhd. This loan was secured by a charge against the property with the consent of PW1.

[11] Sometime in 2003, PW2 was approached and harassed by her friend PW3 to rescue PW3 from her predicament with loan sharks. PW2 had befriended PW3 a few years earlier after having been acquainted in a motor association. PW3 testified that she initially borrowed about RM50,000 from a loan shark and she and her family were threatened with murder unless she forthwith settled the loan. In desperation PW3 persuaded and pleaded with PW2 over a span of two weeks for financial help.

[12] The proposal of PW3 was for PW2 to obtain a bank loan and charge the property as security for the loan to assist PW3. PW2 would be repaid by PW3 within a year.

[13] In the meantime pending obtaining the bank loan, PW3 borrowed about RM100,000 in PW2's name from a loan shark, Chin Soon Fuat ('Chin') to settle the earlier loan. The loan from Chin was a short term one which carried a very high interest rate. PW2 was initially reluctant to borrow from Chin but eventually relented after PW2 was also threatened with murder. Chin did not testify at the trial.

[14] PW3 then arranged for PW2 to meet with her friend, Siw Aik Nam ('Allan') to discuss and devise the plan to obtain the proposed bank loan. It was however discovered that PW2's salary was inadequate to obtain the bank loan for the desired amount to be borrowed. Consequently both PW2 and PW3 on 14 March 2003 acting on the advice of Allan went to the registry of business to register a business in PW2's name.

[15] With the proof of business registration obtained, Allan then arranged for the application and processing of the loan as promised which included fabricating Inland Revenue Department Notices of Assessment (Form J) of business income dated 23 August 2001 and 18 October 2002 in PW2's name.

Bank loan offer and acceptance

[16] Thereafter, by a letter of offer dated 31 March 2003, EON Bank offered a bank loan facility of RM560,000 to PW2. This letter of offer was accepted by PW2 signing on the letter in the presence of Allan and PW3 at Allan's office premises in the Bali Building, Bandar Sunway. There was no bank officer present to attest to PW2's signature.

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Loan documentation

[17] Subsequently in July 2003, both PW2 and PW3 again met Allan at his office premises to sign the loan documentation. The charge instrument (Form 16J) was signed by PW2 in the presence of PW3 and Allan. There was no advocate and solicitor present to attest to PW2's signature.

[18] PW3 was further informed by Allan that PW1 must also sign on the charge instrument, otherwise PW3 would have to arrange for another person to forge his signature. PW2 however protested because she did not wish to notify and involve PW1 in the loan. Furthermore she did not want to participate in the forgery. Allan hence took upon himself to fabricate an identity card of PW1 and caused a person known as Kamarul to impersonate PW1 to sign the charge instrument. The signing took place also at Allan's office at the Bali Building in the presence of PW3. Both Allan and Kamarul did not testify in court as well.

Loan disbursement

[19] On 19 August 2003 after the completion of the loan documentation, both PW2 and PW3 went to the EON Bank Subang Jaya Branch together Allan, Chin and a Lee Chen Leong ('Lee'). The bank clerk gave PW2 a savings passbook with a credit balance of RM360,000 and an auto teller machine withdrawal card. She then signed several forms which were in fact applications for three cashier orders of RM29,075, RM49,075 and RM281,850 drawn in favour of Lee, Allan and Chin respectively. The cashier orders were then distributed to the three of them.

[20] Finally after nearly seven years, all PW1, PW2 and PW3 on 29 January 2010 made police reports at the Brickfields Police Station Kuala Lumpur. The complaints by PW2 and PW3 in their police reports were substantially as narrated above. As for PW1, he further stated that he only became aware of the whole episode after he was informed by his nephew who resided at the property that the property was listed for public auction. He also stated that he did not authorised the discharge of the Wah Tat Bank charge nor sign on the charge instrument for the EON Bank loan at all material times and his signature therein was forged by a Khairul (probably he meant Kamarul) at Allan's office as told to him by PW3. He believed that EON Bank, their solicitors and the loan sharks conspired to defraud him.

Forgery

[21] In the circumstances, it is broadly PW1's contention that he had no knowledge of the EON Bank loan and did not authorised the redemption of

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the earlier existing charge on the property. In addition he did not execute the charge instrument dated 21 July 2003 and annexure thereto. The signatures appearing thereon were hence forged.

[22] PW1 in this regard relied on the different signatures seen on the charge instrument dated 20 March 2000 and 21 July 2003 for the bank loan procured from Wah Tat Bank and EON Bank respectively. Besides, PW1 also emphasised that there was clearly a forged original identity card (exh P3) as confirmed by the National Registration Department via letter dated 2 December 2013 (exh P2) that was used to create the charge and this fact was corroborated by PW3's testimony.

Collusion and conspiracy

[23] It is the plaintiffs' contention that the entire bank loan transaction was perpetrated by the defendant through DW3 in collusion and collaboration with loan sharks. PW2 played no part in the transaction. She further denies she was the beneficiary of the bank loan obtained from the defendant because she did not make any instalment payment since the disbursement of the loan. It was argued at length that the defendant approved the bank loan under dubious circumstances because there was no Form J considered by the defendant for the year 2002 and the Form Js that were relied upon by the defendant for the years 2000 and 2001 were forged ones as confirmed by the Inland Revenue Department via letter dated 28 August 2013. PW2 stressed that her sole income and accordingly the relevant and true Form Js in her possession were only those that emanated from her employment in Lim Kok Wing University which could not justify her qualifying for the loan.

[24] It was also strenuously argued that Suhaili & Song collaborated with the defendant and the loan sharks to defraud the plaintiffs' particularly in the way the security transaction was handled. In brevity, the contention is that Suhaili & Song ought to have known that the plaintiffs had already sold the property to the loan sharks Chin and Allan by their entry of private caveats on the property. Suhaili & Song nevertheless chose to ignore them and went ahead to perfect the bank loan documentation. The defendant must accordingly be culpable because Suhaili & Song was its agent.

Invalidity of charge

[25] Consequently, the plaintiffs argued that the charge on the property is invalid and unenforceable. Pursuant to s 340(2)(a) and (b) of the National Land Code, the charge is plainly defeasible. The cases of *Gibbs v Messer and others* [1891] AC 248, *Australian Guarantee Corpn Ltd v De Jager* [1984] VR 483, *Chiew Lip Seng v Perwira Habib Bank (M) Bhd* [1999] 1 MLJ 310;

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[1999] 5 CLJ 112, *Liew Yok Yin v AGS Harta Sdn Bhd* [2006] 7 MLJ 49; [2006] 3 CLJ 787, *Siaw Kim Seong v Siew Swee Yin (f) & Anor* [2009] 1 MLJ 349; [2008] 5 CLJ 441, *Chong Su Kong & Others v Sia Hiong Yee & Others* [2010] MLJU 957; [2011] 2 CLJ 801, *Tiagaraja a/l Palaniandy (as the administrator for the estate of Palaniandy a/l Pichay Karan, deceased) v Moganadas a/l Maniam (as the personal representative of Maniam a/l Kathan, deceased) & Anor* [2011] 7 MLJ 326; [2011] 4 CLJ 215 and the recent Federal Court case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 987 were all cited in support of the plaintiffs' argument. As such, the plaintiffs seek the reliefs as pleaded including a declaration that the charge is null and void and the order for sale of the property dated 3 October 2007 obtained in the Shah Alam High Court Originating Summons No MT1–24–929 of 2007 be cancelled.

THE DEFENDANT'S VERSION OF THE FACTS AND THE CONSEQUENCES

Loan properly approved

[26] As far as the defendant is concerned, it is an admitted fact that the plaintiffs had previously obtained an overdraft facility of RM100,000 from Wat Tat Bank secured by a charge on the property. Upon the receipt of PW2's undated loan application for refinancing of the property, DW3 testified that she processed the loan. She sighted the original and verified the copies of the Form Js of PW2, current account statements of the Wah Tat Bhd loan obtained by PW2, business registration certificate of Junaidah Sidek Trading and PW2's identity card.

[27] After the bank loan was approved, EON Bank issued the letter of offer dated 31 March 2003 to PW2 and DW3 attested to PW2's signature accepting the bank loan offer on 17 April 2003.

Loan properly documented

[28] Accordingly, EON Bank instructed Suhaili & Song to undertake the loan documentation via its letter dated 17 April 2003. The partner involved in Suhaili & Song, DW4 testified that the transaction was an adhoc reciprocal brief from EON Bank as the borrower was introduced by his firm to the bank.

[29] DW4 further testified that he had attested to the plaintiffs' execution of the charge instrument at his office. It was his firm's practice that the conveyancing clerk would request the signing parties for their identity cards and verifies the particulars therein with the information provided by the bank.

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The parties would then attend before the solicitor who would check their identity cards before they executed the document.

[30] Also DW4 remembered that PW2 and PW1 came to sign the charge instrument before him on separate occasions. The testimony of DW4 is corroborated by DW5 who was the conveyancing clerk of Suhaili & Song at the material time. DW5 very distinctly remembered PW2 who had repeatedly called her urgently enquiring on the execution of the loan documentation.

Charge properly registered

[31] Thereafter EON Bank by letter dated 8 July 2003 disbursed to Suhaili & Song a cashier's order drawn in favour of Hong Leong Bank (previously known as Wah Tat Bank) of RM104,000 to redeem the charge of Wah Tat Bank. DW2 confirmed that Hong Leong Bank received the redemption sum of RM104,000 for the discharge of the Wah Tat Bank charge and settlement of the outstanding sums under the overdraft facility granted to the plaintiffs.

[32] Following the payment of the redemption sum, Hong Leong Bank by letter dated 14 July 2003 forwarded the duly executed discharge of the Wah Tat Bank charge, the duplicate charge dated 24 March 2000 and the original title of the property to Suhaili & Song. The charge was then presented for registration via presentation No 47456/2003 together with the discharge of Wah Tat Bank charge and withdrawal of caveats by Chin and Allan.

[33] The charge was duly registered on 11 July 2005 via presentation No 47006/2005 after Suhaili & Song had sorted out with the Pejabat Pendaftar Hakmilik Selangor over a confusion on technicalities.

Loan properly disbursed

[34] Both DW4 and DW5 also testified that after the presentation of the charge registration of EON Bank, the further disbursement of the loan of RM360,000 was made by a cashier's order drawn in favour of PW2. The cashier's order was forwarded to Suhaili & Song by EON Bank via letter dated 15 August 2003 and was then personally collected by PW2 from Suhaili & Song's office on 18 August 2003. PW2 credited the cashier's order into her savings account and utilised part of the sums to issue cashier's orders to Chin and Allan.

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No fraud or negligence

[35] In crux, it is therefore the defendant's contention that there was no fraud or negligence on the part of the defendant in giving the bank loan to PW2. The plaintiffs had in fact executed the charge instrument and the defendant relies on the case of *Johara Bi Binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 and *Mohd Nasir bin Moidu v Lee Swee Kim* [2011] 7 MLJ 606 to support that the plaintiffs have failed to discharge their onus of proof that PW1 did not execute the charge instrument or that his signature therein was forged.

Estoppel

[36] It was further argued that PW1 was or at least ought to have been aware of the discharge of the Wah Tat Bank charge but did nothing in protest at that material time. He is now accordingly estopped from setting up a defence of forgery following amongst others the cases of *Greenwood v Martin's Bank, Ltd* [1933] AC 51, *Fung Kai Sun v Chan Fui Hing* [1951] AC 489 and *Kodrat Suradji v Banque Nationale de Paris* [1992] 2 SLR 676.

[37] The defendant finally contended that the plaintiffs did not apply to set aside the judgment obtained against PW2 dated 24 December 2004 nor the order for sale dated 3 October 2007 nor raise any allegations that there was fraud perpetrated on the plaintiffs or that PW1 did not execute the charge or of the involvement of loan sharks at the material time when the judgment and order were obtained. Accordingly the plaintiffs are by their inaction now estopped from seeking the relief to set aside the order for sale following the cases of *Ng Yee Fong & Anor v EW Talalla* [1986] 1 MLJ 25, *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 and *Re Thien Kon Thai* [2008] 6 MLJ 278.

FINDINGS OF THE COURT

[38] Since the parties' versions of the facts in issue are at variance significantly, I am mindful of s 101 of the Evidence Act 1950 which provides:

> *Burden of proof*
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

In *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673, Low Hop

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Bing J (as he then was) said '… Under s 101 of the Evidence Act 1950, whoever desire the court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must give prove that those facts as the plaintiff desires the court to give judgment as to its right to claim against the defendant. The burden of proof is on the plaintiff: s 101(2). In order to succeed here, the plaintiff must prove its claim affirmatively'.

Moreover ss 102 to 103 of the Evidence Act 1950 are also relevant in relation to the discharge of that burden and I adopt the evaluation criteria which I have recently applied in *Mayland Lending Sdn Bhd v Rossmaizati bt Mohamad & Anor* SAHC Civil Suit No 22–939 of 2010.

[39] In gist, the burden always lies on the party that asserts. In the discharge of that burden, the acceptability or otherwise of the factual version proffered is dependent on the veracity of the oral testimony of witnesses and the contemporaneous documentary evidence adduced. The oral testimony should be harmonious with the documentary evidence but if they irreconcilably conflict, normally a heavier weightage is accorded to the documentary proof. All available evidence must be critically examined. The ultimate acceptable factual picture should be like a completed jigsaw puzzle correctly fitted with all its matching constituent pieces of evidence.

[40] On the facts, I find that all the defendant's witnesses were truthful from their demeanor and satisfactory explanations vis-a-vis the documentary evidence adduced at the trial. They also withstood and did not falter under rigorous cross-examination by counsel of the plaintiffs.

[41] As for the plaintiffs' witnesses, save for PW1, I find that both PW2 and PW3 were not entirely truthful witnesses. Parts of their testimony defy reasonable common sense. Other parts of their testimony do not wholly fit many of the contemporary documentary evidence. The story as told by both of them is hence in my view to an extent incredulous.

Background circumstances

[42] To begin with, when asked by this court, both PW2 and PW3 denied they were ever business partners. I find it improbable that PW2 who was then merely earning a monthly salary of RM2,600 would have so willingly and graciously helped a distressed friend PW3 to redeem her loan of RM50,000 from loan sharks. The amount of financial help sought by PW3 was beyond PW2's normal financial ability as a salaried employee to help the friend.

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[43] They were undoubtedly to me more than friends. I observed that they sat close together in court after having given their testimony in constant discussion when the defendant's witnesses testified in court.

[44] The more plausible story to my mind and I so find is that both of them were jointly involved in business in Junaidah Sidek Trading which was registered as a business trading in supply of building materials as well as in Junaidah bt Mohd Sidek which was another registered business trading in the supply of health and electronic goods.

[45] Though PW3 had testified that both PW2 and PW3 only went to register a business in 2003 to apply for the EON Bank loan, it is however incontrovertible from the record of the office of the registrar of business that Junaidah Sidek Trading and Junaidah bt Mohd Sidek were in fact already registered since 8 December 1993 and 2 January 2001 respectively. There were also the notices of assessment of business income tax ('Form J') of PW2 produced to EON Bank to obtain the loan.

[46] The plaintiffs have strenuously contended that these Form Js were fabricated because PW2's only income was salary from her employment with Lim Kok Wing University as evidenced by her employment income Form J confirmed vide the Inland Revenue Department's letter dated 28 August 2013. However I note that the letter was in reply to PW2's letter dated 13 August 2013 but PW2's letter was not produced in court to verify the contents of the inquiry made to the Inland Revenue Department in the first place. The officer of the Inland Revenue Department was also not called or subpoenaed to testify in court. In the premise, I find that the letter relied upon by the plaintiffs is inconclusive.

[47] Furthermore I hold it is also not inconceivable that a person may have two income tax files for business income and salary income respectively particularly if they are reported to different branches of the Inland Revenue Department. It is noted here that PW2's business income and employment income Form Js emanated from different income tax files belonging to different branches of the Inland Revenue Department.

[48] Be that as it may and more compelling here, I find that the existence of PW2's business income is corroborated by the nature of the utilisation and drawdown on the loan taken from Wah Tat Bank even though PW2 never explained the purpose of that loan. The current account bank statements of PW2's bank loan obtained from the Wah Tat Bank from October 2002 to February 2003 showed a running account typical of an active business operation. The debit closing balance recorded an amount of RM108,725.31 owing by PW2 to the bank as at 28 February 2003.

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Need for the loan

[49] At that time, I find PW2's businesses were probably facing cash flow problems and both PW2 and PW3 desperately had to find more money for turnover of the trading businesses.

[50] As the result, both PW2 and PW3 obtained money from the third parties, to wit, Allan and Chin whom they coined as loan sharks. In order to settle the money obtained from these third parties, they devised the plan to obtain the larger loan from EON Bank by way of refinancing the property.

[51] They blamed the third parties that they were both under coercion by these third parties to obtain the loan to refund the third parties. This is to my mind mere conjecture to gain sympathy from the court. Both PW2 and PW3 did not also offer any explanation on the private caveats entered on the property that revealed these third parties were purchasers of the property who had paid deposits to PW2. The purchase of the property by these third parties throws doubt that they were loan sharks as alleged by both of them. It is plausible that PW2 and PW3 might have utilised the property purchase deposits for their business and had to obtain the EON Bank loan to refund these third parties.

Loan procurement, documentation and utilisation

[52] Consequently, I find that the EON Bank loan offer was voluntarily applied by PW2 and subsequently accepted by her before DW3 on 17 April 2003. The plaintiffs tried to capitalise on the differing purposes stated for the loan in the loan application form, letter of offer and charge annexure. I do not however find the differences to be material and highly suspicious as claimed. The loan application was probably filled up in haste but the true loan purpose is correctly stated in the letter of offer. The charge annexure is a standard form of agreement and necessary deletions were made. Ultimately there was still a loan that satisfied PW2's need to refinance the property with surplus additional money for her other purposes.

The loan documentation was thereafter executed. In this regard, I further find and hold that the signature of PW2 on the charge instrument was signed by her before DW4 as testified by DW4 and DW5. The loan was accordingly utilised by PW2 to redeem the loan from Wah Tat Bank as well as to pay the third parties in refund of their deposits paid to PW2.

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Forgery

[53] As for PW1, I find him a truthful witness and I accept his testimony that he was unaware of the EON Bank loan transaction at the material time because he was away working in Manjung, Perak. By his demeanor in court, I observed that he and PW2 were somewhat estranged and he left forthwith after having testified in court looking annoyed.

[54] As to the issue of alleged forgery of PW1's signature on the charge instrument, the signatures of PW1 on the Wah Tat Bank charge instrument and that on the EON Bank charge instrument do not also appear alike. As pointed by PW1, one signature carried a 'w' whilst the other carried a 'u' in respect of 'Ridzwan'. There was no handwriting expert called by either party to assist the court. The plaintiffs however relied on s 73 of the Evidence Act 1950 which provides:

> (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been made or written by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.
>
> (2) The court may direct any person present in the court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by that person.

The plaintiffs also submitted that in *Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd* [1980] 2 MLJ 83, the trial judge is entitled to invoke s 73 of the Evidence Act to make comparison of signatures which is in dispute and make a conclusion on its genuineness where the documents were executed in the ordinary course of business and are obvious to an untutored eye. Furthermore the plaintiffs quoted Gopal Sri Ram JCA (as he then was) in *Siaw Kim Seong v Siew Swee Yin (f) & Anor* [2009] 1 MLJ 349; [2008] 5 CLJ 441: 'Had the judge undertaken such an examination he would have concluded, even without the aid of an expert, that the signatures appearing on the assignment and the transfer were plain and undisguised forgeries.'

[55] The defendant however rely on the cases of *Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 4 MLJ 651 and *McLaren Saksama (M) Sdn Bhd v Hong Leong Bank Bhd* [2014] 7 MLJ 104 where forgery was not found simply because differing signatures were shown. It is submitted by the defendant that PW1 had signed differently even on the documents admitted by him, to wit: the Wah Tat Bank charge instrument and the police report made by him.

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[56] The signature of PW1 is obviously different between that in the Wah Tat Bank charge instrument and the EON Bank charge instrument even to the lay eye. However I accept that the differing signature per se is insufficient to establish that the signature had been forged especially since PW1 had also signed on documents differently at different points in time.

[57] Be that as it may, there are nonetheless also other circumstances that suggest the signature of PW1 on the EON Bank charge instrument was forged by an impersonator. In this respect, I accept PW3's testimony to the extent that the signature of PW1 was forged by a Kamarul and I find that Kamarul used the forged identity card of PW1 (exh P3) to identify himself as PW1 to deceive DW4 at his office. However the remainder of PW3's testimony on this aspect that Kamarul signed the charge instrument at Allan's office at the Bali Building in her presence cannot be believed as there is otherwise no necessity to produce a forged identity card.

[58] In essence, I find that the forged signature of PW1 was that signed by Kamarul who impersonated PW1 before DW4 at Suhaili & Song's office using the forged identity card of PW1 produced in court by PW3. I have made a comparison of the thumb print of PW1 imprinted in court as exh P4 with that imprinted on exh P3 and it is again obvious even to the lay eye that the thumb prints are pronouncedly different. The differing thumb print is corroborative of the forgery. That notwithstanding, I have also noted that both DW4 and DW5 were not as sure having met PW1 as compared to PW2 at the time of attestation of the charge instrument.

[59] In the circumstances as a whole, I therefore find and hold on the balance of probabilities that the signature of PW1 on the charge instrument was forged following *Johara Bi Binte Abdul Kadir Marican v Lawreance Lam Kwok Fou & Anor* and *AGS Harta Sdn Bhd v Liew Yok Yin* [2010] 1 MLJ 309; [2010] 7 CLJ 142 on the required standard of proof and sufficiency of evidence to discharge that standard respectively.

Fraud and negligence

[60] Accordingly from the facts as found by this court, I also find and hold that there was no fraud or negligence committed on the part of the defendant, whether through DW3 or their agents, Suhaili & Song as alleged by the plaintiffs. They have at all material times acted honestly and professionally.

[61] As for fraud, the standard of proof to be discharged on the part of the plaintiffs is beyond reasonable doubt as held in *Yong Tim v Hoo Kok Chong* [2005] 3 CLJ 229 and *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301. The plaintiffs here have not only failed to plead

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conspiracy to defraud sufficiently but more pertinently also failed to adduce cogent evidence that met the required high burden of proof to justify their plea of fraud. The plaintiffs in other words fell far short of meeting the burden required of them on the facts as found.

[62] With regard to the negligence as alleged by the plaintiffs, I find and hold the plaintiffs have not proved that the defendant was careless by having failed to act in accordance with the standard banking practices in approving the bank loan.

[63] The defendant was in my view not negligent for not conducting proper investigations with the Companies Commission of Malaysia and/or Inland Revenue Department as alleged by the plaintiffs because the documentation provided by PW2 was sufficient to qualify her for the loan. There was hence no requirement for the defendant to conduct further investigation or credit evaluation in respect of such business. Furthermore the plaintiffs have not demonstrated that standard banking practices require the defendant to further verify the Form Js received from the loan applicant with the Inland Revenue Department.

[64] As to the contention that the defendant ought not to have approved the loan because PW2 did not qualify based on her employment salary, there is no evidence led by the plaintiffs to demonstrate that the defendant was aware of the existence of those Form Js emanating from her employment with Lim Kok Wing University when approving the loan. In fact PW2 conceded that she never gave those Form Js to the defendant.

[65] In respect of the execution of the charge instrument, the defendant was also in my view not negligent because DW4 had explained the provisions of the charge to the plaintiffs and attested to them signing personally. It is not an act of negligence where DW4 was conned by an impersonator because he had taken due care to verify the person with his identity card.

[66] As to Suhaili & Song's advise to the defendant to disburse the loan notwithstanding the presence of private caveats on the property, it was not done negligently because land searches on the property were conducted and the disbursement only occurred after the private caveats lodged by the third parties were withdrawn.

Legal consequences of forgery

[67] Now as to the consequences of the charge that was obtained through the forged signature of PW1 as found, s 340 of the National Land Code provides:

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(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by and written law.

(3) Where the title or interest of any person is defeasible by reason of any of the circumstances specified in sub-section(2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested.

Provided that nothing in the sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[68] It was held in *Tiagaraja a/l Palaniandy (as the administrator for the estate of Palaniandy a/l Pichay Karan, deceased) v Moganadas a/l Maniam (as the personal representative of Maniam a/l Kathan, deceased) & Anor* [2011] 7 MLJ 326; [2011] 4 CLJ 215 that a forged instrument is an insufficient or void instrument and is accordingly of no effect following *Siaw Kim Song v Siew Swee Yin (f) & Anor* . This is so in a jointly created instrument where a party did not truly sign on the instrument notwithstanding that the other parties signed following *Chong Su Kong & Others v Sia Hiong Ye & Others*. In that case David Wong Dak Wah J (as he then was) said: '... *However I concede that even if the plaintiffs can show on a balance of probability that one of the plaintiffs did not sign the power of attorney, the power of attorney is invalid*. In my view the intent of such power of attorney must be a joint one and cannot be severed as the plaintiffs are all co owners of the land'. (Emphasis added.) On a similar note, the plaintiffs here are plainly co-chargors.

[69] In the premise, I find and hold that the charge instrument here is void and of no effect.

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Estoppel

[70] As to the strenuous and persuasive contention of the defendant that it is unjust for this court to intervene based on two grounds of estoppel in that:

(a) firstly PW1 was or ought to be having aware and acquiesced to the creation of the charge. Thus the plaintiffs are precluded from raising forgery here; and

(b) secondly the plaintiffs ought to have raised this defence of forgery at the hearing of the foreclosure proceedings of the property before the order for sale dated 3 October 2007 was made. In other words, the plaintiffs are now barred by issue estoppel.

[71] On the first estoppel ground, it is a question of fact as to whether PW1 knew that the charge was created between 2003 and 2004. I find that PW1 had since 2000 left the family home which was the postal address for communication with Wah Tat Bank and EON Bank on the loans. Since he was working in Manjung, Perak, he occasionally only visited the family home. There is no cogent proof tendered before this court that PW1 had actual knowledge of the redemption of the Wah Tat Bank charge. Although he has acknowledged that the redemption statement was copied to him, there is no evidence that he had received and seen it at the material time. The facts in the cases of *Greenwood v Martin's Bank, Ltd* and *Kodrat Suradji v Banque Nationale de Paris* relied by the defendant are distinguishable because there was actual knowledge found therein particularly in the former where the plaintiff conspired with the wife to conceal from the defendant bank pertaining to the forged cheques drawn by the wife. Constructive knowledge is in my view insufficient to justify an estoppel against PW1 on the basis as alleged by the defendant.

[72] As to the other estoppel ground, I hold that issue estoppel cannot be raised to overcome a challenge that an instrument is void as declared by statute, particularly if it is now so found by this court. It is unjust to the first plaintiff if the order for sale of the property is maintained.

[73] The cases of *Ng Yee Fong & Anor v EW Talalla, Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* and *Re Thein Kon Thai* cited by the defendant establish the general principles on cause of action estoppels and issue estoppels. The facts therein are very different. In *Arnold v National Westminster Bank plc* [1991] 2 AC 93, Lord Keith of Kinkel held: 'One of the purposes of estoppels being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result'. I find and hold that the seriousness of the situation here is one that fits into the so called special circumstances because the situation is akin to one of

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illegality. The forgery that was made in the creation of the charge instrument knowingly or as abetted by PW2 and PW3 is obviously unlawful under the Penal Code. It is seen in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 that illegality can be raised at any time and Lord Oliver of Aylmerton held: 'It is well established as a general principle that illegality of an agreement sued upon is a matter of which the court is obliged, once it is appraised of facts tending to support the suggestion, to take notice *ex proprio motu* and even though not pleaded (see for eg, *Edler v Auerbach* [1949] 2 All ER 692) for clearly no court could knowingly be party to the enforcement of an unlawful agreement'.

[74] In the circumstances, I reject the estoppel contentions raised by the defendant.

[75] I note that the defendant has also contended that there would be unjust enrichment if the charge is set aside because PW2 had benefitted from the EON Bank loan. In this respect, the defendant has suggested that the original charge that belonged to Wah Tat Bank (and coincidentally now also the defendant) be reinstated. In other words, the defendant must be entitled to restitution, otherwise the plaintiffs will be unjustly enriched. Though superficially attractive, I am however unable to accept the reinstatement proposition by reason that the sub stratum of the original charge, to wit: the Wah Tat Bank loan no longer exists because that loan was redeemed. This is an action to invalidate the charge but not to exonerate the second plaintiff who borrowed the money. The appropriate relief may be for PW2's trustee in bankruptcy to recover from the undivided share of PW2 in the property.

CONCLUSION

[76] I therefore declare that the charge is null and void and order that the order for sale dated 3 October 2007 made vide Shah Alam High Court Originating Summons No MT1–24–929 of 2007 be set aside.

[77] There is no award of damages or interests to the plaintiffs because their plea on fraud or negligence has been rejected. Besides they have not been proved to have been incurred.

[78] There is also no order as to costs because it is only the first plaintiff who was faultless but not the second plaintiff and both the plaintiffs are related and jointly represented by the same counsel and firm of solicitors.

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A *Charge declared to be null and void and order for sale of property was set aside.*

Reported by Ashok Kumar

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